CHEUNG KONG PLANTATIONS SDN BHD

v.

MALAYAN UNITED FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: P-02-24-97]
23 FEBRUARY 2000

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Application for - Whether unreasonably delayed - Whether there were issues that merited a trial - Whether default judgment a nullity - Whether entered regularly - Whether judge exercised discretion properly - Whether there was any appealable error*

The plaintiff ('the respondent') had earlier commenced an action against the 1st defendant ('the appellant') and its two guarantors (the 2nd and 3rd defendants) for the recovery of a loan given to the appellant. This was the appellant's appeal against the decision of the High Court dismissing its application to set aside the judgment in default entered against it on 13 November 1986.

Held:
Per Gopal Sri Ram JCA

[1] The summons to set aside the judgment in default was not taken out until 23 September 1991. The learned judge was right in his conclusion that this five-year delay was unreasonable.

[2] The respondent was contractually entitled to vary the rate of interest. It was also entitled to recover default interest.

[3] The learned judge was therefore right in his conclusion that there were no issues that merited a trial. The judgment in default was not a nullity; it was regularly entered. The learned judge had exercised his discretion correctly.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak plaintif ('responden') telah, sebelum ini, memulakan suatu tindakan terhadap defendan pertama ('perayu') dan dua penjaminnya (defendan ke2 dan ke3) untuk mendapatkan semula pinjaman yang diberi kepada perayu. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi untuk membuang permohonannya untuk mengenepikan penghakiman ingkar yang dibuat ke atasnya pada 13 November 1986.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Saman untuk mengenepikan perintah ingkar tidak dikeluarkan sehingga 23 September 1991. Hakim bijaksana memang betul dalam konklusinya iaitu penangguhan lima tahun ini tidak munasabah.

[2] Pihak responden mempunyai hak kontraktual untuk mengubah kadar faedah. Ia juga berhak untuk mendapatkan kembali faedah ingkar.

[3] Hakim bijaksana sememangnya betul dalam konklusinya bahawa tidak terdapat isu-isu yang dapat menunjukan merit untuk mengadakan perbicaraan. Perintah ingkar tidak merupakan suatu pembatalan, ianya telah dikeluarkan mengikut aturan. Hakim bijaksana telah mempergunakan budi bicaranya dengan betul.

[Rayuan dibuang.]

Case(s) referred to:
Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor [1986] 1 CLJ 417 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Lian Keow Credit v. Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162 ***(refd)***
Malaysian Building Society Bhd v. Lim Kheng Kim [1988] 1 CLJ 675 ***(refd)***
The Tasmania [1890] 15 App Cas 233
Tuan Hj Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 MLJ 30 ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***

For the appellant - Mahinder Singh Dulku (Harjit Singh with him); M/s Harjit Singh Sangay & Co
For the respondent - Toh Lee Hong (Kek Boon Wei with her); M/s Kek Ooi & Lee Hong

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-341-1986]

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal directed against the order of the High Court in Penang dismissing an application to set aside the judgment in default entered against the appellant as long ago as 13 November 1986.

The facts that form the background to this case have been dealt with in extenso by the learned judge in his judgment. We find it unnecessary to repeat them here. Suffice to say that the respondent had on 26 September 1986 commenced an action against the appellant and two other persons for recovery of a loan made by it to the appellant. The 2nd and 3rd defendants in the court below had guaranteed that loan. After the writ had been served, the 2nd and 3rd defendants entered an appearance. We have been advised by counsel that there were proceedings for summary judgment between the respondent and those defendants. There is another appeal pending before this court in respect of those proceedings with which we are not concerned here today. In the meantime, judgment in default was entered against the appellant on 13 November 1986.

It was not until after the respondent had commenced winding-up proceedings that the appellant's solicitors realised that they had neither entered an appearance nor delivered a defence. Steps were then taken to enter an appearance and to set aside the judgment. It may be added for good measure that although appearance was entered on 25 November 1986, the summons to set aside the default judgment was not taken out until 23 September 1991.

In declining to set aside the judgment in default, the learned judge relied on two grounds. First the delay of some five years in the making of the application. In this context, he referred to and relied on the judgments of Edgar Joseph Jr. J, (as he then was) in *Malaysian Building Society Bhd. v. Lim Kheng Kim* [1988] 1 CLJ 675; [1988] 3 MLJ 175 and in *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417. He also relied on the judgment of this court *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223 and that of the Federal Court in *Tuan Haji Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 MLJ 30. Of these, the last two were plainly binding on him. After a careful scrutiny of the explanation advanced by the appellant, the learned judge came to the conclusion that the delay was unreasonable.

The second point on which the judge proceeded was the merits of the case itself. He came to the conclusion the rate of interest upon which complaint had been made before him was really a matter upon which the respondent had a discretion. In other words, there was a contractual power in the respondent to vary the interest. After careful consideration of the evidence led before him, he concluded there was no merit in the sense there were no issues that merited a trial.

Before us, Mr. Mahinder Singh Dulku has argued with much force that the judgment in default was a nullity. He has drawn our attention to what he says is a serious deficiency in the statement of claim. He submits that the judgment in default is ambiguous just as the judgment in default was in *Tuan Haji Ahmad Abdul Rahman's case (supra)*. The mainstay of his argument is that since the judgment in default is a nullity, he is entitled to have it set aside *ex debito justitae* notwithstanding the delay complained of by the respondent.

The other complaint is that the impugned judgment includes default interest which, it is said, the respondent was plainly not entitled to recover. It follows, counsel argues, that judgment was entered for too much and is therefore a nullity. However, Mr. Mahinder Singh readily concedes that these arguments were not canvassed before the learned judge but contends that since it is a matter upon which further evidence is not required, it may be raised at the appellate stage. (*Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9, applying *"The Tasmania"* [1890] 15 App. Cas. 233.)

We will assume, without deciding, that it is indeed open to Mr. Mahinder Singh to take the point before us. However, having carefully scrutinised the pleadings and the judgment, we arrive at the same conclusion as the learned judge namely, that the judgment was regularly entered. So far as the default interest point is concerned, our attention has been drawn by respondent's counsel to the documents executed by the parties which, when read in their proper context, permits the recovery of such interest. We are therefore constrained, with respect, to reject the arguments of Mr. Mahinder Singh that the judgment in default was a nullity.

Accordingly, the case turns upon whether the learned judge exercised the discretion vested in him correctly in refusing to set aside the judgment in default. We have said on numerous occasions that in an appeal against the exercise of discretion by a judge in the court below this court has the initial function of review only. We have no original discretion. It is only when an appellant can satisfy the appellate court that the trial judge had

taken into account irrelevant considerations, or omitted relevant considerations or had otherwise misdirected himself on the law that an appellate court is entitled to exercise a discretion of its own: *Lian Keow Credit v. Overseas Credit Finance (M) Bhd. & Ors.* [1982] 2 MLJ 162.

Having carefully perused the learned judge's judgment, we are unable to detect any appealable error and are satisfied that he acted correctly in dismissing the appellant's application to set aside the default judgment.

For the reasons stated above, the appeal is dismissed with costs. The orders made in the court below are affirmed. The deposit to be paid out to the respondent to account of its taxed costs.